1989

Salt Lake Piano Company v. Richard F Williams and Sandra G. Williams, formerly husband and wife : Response to Petition for Rehearing

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

SALT LAKE PIANO COMPANY, Plaintiff and Appellant, vs. RICHARD F. WILLIAMS and SANDRA G. WILLIAMS, formerly Husband and Wife, Defendants and Respondent.	ANSWER TO PETITION FOR REHEARING Circuit Court No. 81 CVMU 4817 Utah Court of Appeals No. 890199-CA Category 14b

ANSWER TO PETITION FOR REHEARING

APPEAL

FROM THE

THIRD CIRCUIT COURT

MURRAY DEPARTMENT

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COMES NOW the defendant and respondent Sandra G. Williams (defendant), by and through her attorney, Lynn P. Heward, and submits this Answer to Petition for Rehearing pursuant to the request of the Court and in accordance with Rule 35 of the Rules of the Utah Court of Appeals.

THE TRIAL COURT PROVIDED SUFFICIENT EXPLANATION OF ITS RULING

In its "Supplemental Motion to Reconsider," plaintiff contends that Rule 41(b) of the Utah Rules of Civil Procedure mandates Findings of Fact and Conclusions of Law when there is an involuntary dismissal. A careful reading of this rule reveals that such is not the case.

Rule 41(b) reads as follows:

> For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against him. After the plaintiff, in an action tried by the court without a jury, has completed the presentation

> of his evidence the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. The court as trier of the facts may then determine them and render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence. If the court renders judgment on the merits against the plaintiff, the court shall make findings as provided in Rule 52(a). Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction or for improper venue or for lack of an indispensable party, operates as an adjudication upon the merits. [Emphasis added.]

It is clear from the context of this rule that the Court need only make findings when it grants defendant's motion to dismiss at trial upon the close of plaintiff's case in chief. In the instant matter, the case never went to trial; there was no evidentiary hearing.

An example of a case where the Rule 41(b) mandate for findings applied was Davis v. Payne and Day, Inc., 10 Utah 2d 53, 348 P.2d 337 (1960). There the trial court, sitting without a jury, failed to make "findings of fact as authorized by Rule 41(b) U.R.C.P." upon granting defendant's motion to dismiss after hearing plaintiff's evidence.

In that case, the Supreme Court did not automatically reverse, but rather considered the evidence in the light most favorable to him. Here, plaintiff argues, and rightfully so, that in any event this Court must have the evidence considered in the light most favorable to it anyway insofar as the review of this

matter is considered analogous to a review of the granting of Summary Judgment.

A case where the Appellate Court was recently reviewing a Summary Judgment is quite helpful in this regard. In Taylor v. Estate of Grant Taylor, 102 U.A.R. 36 (Utah App. 1989) the trial court ruled that a document was invalid and assessed attorney's fees against the plaintiff. The trial court's order did not specify the legal basis for the award nor how the court arrived at the amount assessed.

The Taylor court stated on pages 38 to 39:

> At the outset, we note that findings of fact are unnecessary in connection with summary judgment decisions.
>
> ...
>
> [T]he material facts are, by definition, undisputed and there are no facts which the court has to find.

The decision went on to show that there were no disputes with respect to the material facts. It then addressed on page 39 the problem created by an absence in the record of the trial judge's legal basis for awarding attorney's fees:

> However, to affirm this award we must also conclude, in light of the undisputed facts, that a legal basis exists for the award. Our task is complicated somewhat by the fact that the exact legal basis the court had in mind in awarding fees does not appear in the court's judgment. No transcript was made of the hearing during which the issue of fees was argued, nor is there a written memorandum informing this court and the parties of the trial court's legal view of the matter. However, it is appropriate that we affirm if the trial court's decision can be sustained on any proper legal basis.

The Court went on to determine that the undisputed facts legally supported the ruling on the validity of the document and formed a sufficient basis for the trial court's discretion to grant attorney's fees. However, only Rule 11 seemed to support the award for attorney's fees, and no fact in the record justified applying that Rule to the plaintiff and not to his attorney, so a remand on that issue was necessary.

In the instant matter, even though "it is appropriate [to] affirm if the trial court's decision can be sustained on any proper legal basis," the task is simpler by reason of the language of the Order of Dismissal specifying certain bases which the trial court had in mind in granting the dismissal with prejudice.

As indicated in that Order, the dismissal was grounded in Rules 4 and 41 of the Rules of Civil Procedure, and in addition, upon the equitable principle of laches.

This specification by the trial court of its grounds would appear to qualify as "a brief written statement of the ground for its decision." However, plaintiff has argued that this written statement contained in the Order is less than what is required by Rule 52. Even if plaintiff were correct in its view that the statement of grounds is more cryptic than envisioned by the drafters of Rule 52, that rule only requires such a statement on motions granted under Rules 12(b), 50(a) and (b), 56, and 59. Defendant's Motion to Dismiss was not necessarily granted under one of those enumerated rules. In fact, this list omits the two rules specified by the trial court.

THERE ARE NO MATERIAL ISSUES OF FACT

Plaintiff has claimed that numerous "facts" have been overlooked or misapprehended by this Court in upholding the ruling of the trial court. As these are examined, it can be seen that each claimed fact is irrelevant to the Court's decision and/or has no evidence to support it.

It is logical to assume that the trial court used as the factual basis for its decision the verified Statement of Facts contained in the defendant's Statement of Points and Authorities in Support of Motion to Dismiss dated February 1, 1989, which document was attached to the Motion for Summary Affirmance dated April 20, 1989 and filed herein.

A review of that Statement of Facts shows that they are uncontroverted. The closest that defendant comes to a dispute of these facts is contained in the last two lines of page 7 of its Statement of Points and Authorities in Opposition to Motion to Dismiss dated February 16, 1989, which document was attached to the Response to Motion for Summary Affirmance dated April 24, 1989: "She claims that she was unaware that she owed plaintiff any money. Horsefeathers."

The Supreme Court in Massey v. Utah Power & Light, 609 P.2d 937, 938 (Utah 1980) stated that "bare contentions, unsupported by any specification of facts in support thereof, raise no material questions of fact as will preclude the entry of summary judgment."

In Reeves v. Geigy Pharmaceutical, Inc., 764 P.2d 636 (Utah App. 1988), cited by plaintiff, this Court stated that it

takes a "sworn statement to dispute the averments on the other side of the controversy and create such an issue [a genuine issue of material fact]." Id. at 640. The Court noted that the appellant had "not pointed to any sworn evidentiary material in the record" (Id. at 642) creating a dispute regarding essential elements of appellant's seventh cause of action. Therefore, the summary judgment against appellant on that cause was upheld.

Plaintiff has expressed concern over omission by the Court's Memorandum Decision of the following facts:

1. Plaintiff filed an action in 1978 which was deemed dismissed under Rule 4(b) when no defendant was served within one year.

2. Details of other efforts of plaintiff.

3. Specification that the divorce of the defendants occurred after their move from Utah.

4. Specification that service of summons on defendant was by means of acceptance of service by counsel.

5. Defendant moved for summary disposition on appeal.

6. Plaintiff followed the procedure required by Rule 71B.

7. Plaintiff claimed before the trial court that Rule 71B applied.

Even assuming that these numbered facts are accurate and supported by the record, which some are and all may be, in the case of each such numbered fact (a) its omission does not show its misapprehension by the Court, (b) it is irrelevant to the reasoning of the decision, and/or (c) alternative grounds contained

in the decision still justify exactly the same result.

The only facts which might possibly reach the level of causing an altering of the reasoning of the Memorandum Decision would be numbers 6 and 7 regarding Rule 71B.

In its Statement of Points and Authorities in Opposition to Motion to Dismiss dated February 16, 1989, plaintiff argued that Rule 71B applied.

Defendant's counsel received a letter dated May 23, 1988, from plaintiff's counsel:

> Enclosed is a Rule 71B affidavit to be filed in the above entitled matter. As you will recall, we discussed the methodology of fully complying with the provisions of Rule 71B, and we agreed that if I would prepare and file an affidavit we would consider Rule 71B to have been fully complied with. Your agreement does not prejudice your right to challenge the applicability of the Rule, but simply agrees that we need not start over, and that you will not challenge the Rule for technical reasons.

Such an affidavit may have been executed and filed. As can be seen, defendant's counsel attempted to assist plaintiff in matters such as the service of process in order to save the parties additional expense and delay which seemed to serve no useful purpose. The defendant desired an expeditious final and complete resolution of this action.

RULE 71B DOES NOT JUSTIFY REVERSAL

Rule 4(b) states that summons must be served within one year from the date the complaint is filed. It states that when there are more than one defendant, once one defendant has been served any others may be served at any time before trial.

Rule 4(b) does not clarify the procedure where one defendant has been served and trial held and another defendant may be served before the expiration of one year. That situation is covered by Rule 71B.

Plaintiff has argued that even though the one year expired long ago, Rule 71B nevertheless applies. It argues that even though Rule 4(b) provides for only one exception to the deemed dismissal for failure to serve a defendant within one year, and even though Rule 71B does not even refer to the Rule 4(b) dismissal, that Rule 71B should be construed to provide another exception. There is no reason for Rule 71B to be construed to contradict the plain language of Rule 4(b).

If Rule 71B were to have any effect more than one year after the filing of the Complaint, it would seem to be only as an alternative to filing a new action after a dismissal under Rule 4(b), assuming that the said deemed dismissal were construed to be without prejudice. Hence it would be subject to the same defenses as a new action against the remaining defendant or defendants. These defenses would include those specified by the trial court as reasons for dismissal with prejudice, namely, the bar resulting from two prior dismissals in light of Rules 4 and 41, and the equitable principle of laches.

Thus even if Rule 71B might allow service after one year, this Court's Memorandum Decision is still certainly accurate in stating that Rule 71B cannot justify a failure to serve this defendant for almost seven years, particularly when she had no knowledge of

any claim or action filed against her.

RULE 41 MANDATES DISMISSAL WITH PREJUDICE

Plaintiff argues that since the dismissals referred to above were not technically voluntarily obtained in accordance with the procedures in Rule 41(a), they do not suffice to bar a subsequent filing. Rule 41(a) should not be read so narrowly.

There was no action on the part of the defendant, such as a motion to quash, in the case of either dismissal. In each case, plaintiff filed the action and then did not serve the defendant within one year nor before trial. It would be incongrous to allow the unilateral actions of a plaintiff to result in two dismissals, both without prejudice, despite the rule that the second voluntary dismissal operates as an adjudication on the merits.

Rule 41 also encompasses, in subdivision (b), dismissal for failure to prosecute. As indicated in plaintiff's Motion to Reconsider; Petition for Rehearing, dated June 14, 1989, dismissal for failure to prosecute is a variation of the doctrine of laches, and therefore most of the applicable principles will be discussed below under Laches.

One argument brought up by plaintiff that apparently only applies to its failure to prosecute is the argument that plaintiff's motion to dismiss on that basis came too late.

Plaintiff cannot claim prejudice by any delay or implied waiver of this basis. The very first document filed by defendant in response to the first documents served on her was her Answer dated February 19, 1988. The Fourth Defense in that Answer was

"This action should be dismissed with prejudice for failure to prosecute."

Defendant's delay in bringing a Motion to Dismiss on this basis was only to allow time for discovery to produce the facts appropriate for the trial court's consideration in ruling on such a motion.

In the case of Wilson v. Lambert, 613 P.2d 765 (Utah 1980), the same issue was raised. The action was filed in 1968. In January of 1978, the trial court sua sponte considered the question of dismissal for failure to prosecute, but decided to set the matter for trial. Nine months later, the defendant in that case filed a motion to dismiss for failure to diligently prosecute, which was granted.

In upholding the dismissal, the Supreme Court stated:

> Plaintiffs argue ... that defendant waived the right to move for dismissal on the stated grounds by not doing so at an earlier date. Rule 41(b) sets no deadline for the moving party to act; indeed, the court retains inherent power to dismiss an action for failure to prosecute pursuant to its own motion. It can hardly be asserted that a defendant must, on pain of implied waiver, move within a certain time limit, when the court may issue a dismissal order without any action whatsoever on the part of the parties. Id. at 768.

LACHES FULLY JUSTIFIES THE COURT'S EXERCISE OF DISCRETION

It would seem that the factors to be considered in applying the principle of laches are the actions of each party with respect to moving the case forward and the length of time involved.

Plaintiff complains at what it views as short shrift

given its list of actions taken to serve the defendant with summons. It is true that the circumstances of each case and the actions of each party should be examined, but that does not mean that the "due diligence" of the plaintiff must only be evaluated by a subjective standard.

Looking at the delay objectively, absolutely nothing took place in the case as to this defendant from the time it was filed in 1981 until she was served in 1988.

As it states in 24 AmJur 2d Dismissal Sect. 50 at 42, "plaintiff's obligation is satisfied by a showing of progress" [emphasis added]. There is no showing of progress with respect to any defendant after 1981 until the 1988 acceptance of service.

Another way of measuring the efforts objectively is to compare their results to the results obtained for a $25 initial investment in November of 1987, several months after plaintiff had abandoned its efforts to locate the defendant. That expenditure resulted in someone new examining the facts and locating the defendant by the following month.

Even if that is not a fair comparison due to better technology becoming available, a case should not be able to be resurrected indefinitely as new technology is developed. The basis for statutes of limitation and laches is that after a certain stated or equitable period of time a person should be free from having to defend against a stale claim.

Perhaps the years of delay and the absence of successful action by the plaintiff might be mitigated somewhat if defendant had

unclean hands or tried to impede or thwart plaintiff's efforts to move this case forward, but such was not the case.

Plaintiff tries to use innuendo and accusations and criticism to paint the defendant as a person who knew she owed the plaintiff money and purposefully violated her contract and tried to hide and evade. But the facts and reason show just the opposite.

The verified facts are that the defendant moved from this state in 1977 under the impression that the debts owed, including the debt to plaintiff, were paid. They had sold their home in Utah for a good profit, and she assumed her husband, who handled the finances, had paid their debts. She and her husband separated in about 1980 and within a few months they were divorced. He has not paid any support for their child since then. Defendant has of course had to personally handle the family finances since then and has openly sought and obtained credit in her married name for consumer items. She was unaware until 1987 that plaintiff claimed a balance was still owing.

In contrast to these plain, simple, understandable, and reasonable facts sworn to on the record, plaintiff condemns the defendant for (a) moving from the state of Utah without notice to plaintiff, (b) taking the piano from the state in violation of the agreement, (c) never contacting the plaintiff to see what if any amount was owed, (d) moving without leaving precise forwarding addresses, (e) not informing plaintiff of the divorce decree provisions, (f) residing outside the state of Utah without trying to contact or pay plaintiff what she knew to have been owing at

one time, (g) demonstrating no hardship by reason of the delay (other than a ten-fold increase in the amount claimed that anyone would have to defend).

Even if defendant had known that any debt to plaintiff was still unpaid, these actions would certainly not rise to the level of unclean hands or otherwise prevent the court from doing equity. For example, it would seem unlikely that a wife who relied on her husband in financial matters and signed with him on a purchase agreement would read or remember the provision in small print requiring her to get permission before moving their piano to a new address. And if she did remember, it would be unlikely for her to really believe she had to personally take care of that before they could move.

Once such facts and arguments were presented, the trial court employed its discretion in dismissing on the basis of laches.

> No exact rule can be laid down as to when a court is justified in dismissing a case for the plaintiff's failure to prosecute or for delay in prosecuting his action; each case must be looked at with regard to its own peculiar procedural history and the situation at the time of dismissal. The question of laches ordinarily depends on whether, under the facts and circumstances of the particular case, the plaintiff is chargeable with want of due diligence in failing to proceed with reasonable promptness. The question is addressed to the sound judicial discretion of the trial court, whose ruling will not be disturbed on review in the absence of anything to indicate abuse of discretion in this respect. 24 AmJur Dismissal Sect. 50 at 40-41.
>
> [T]he trial court may dismiss an action where there has been a failure, for an unreasonable period of time after the filing of the complaint, to have the summons issued ....

> Dismissal or discontinuance of an action for delay in the issuance or service of summons [not based on statute or rules of court] is a matter committed to the trial court's discretion. 24 AmJur Dismissal Sect. 51 at 42-43.

This general rule has been specifically endorsed and applied in Utah:

> Pursuant to this rule [41(b)], it is held, in both state and federal practice, that the disposition of a motion to dismiss for failure to prosecute rests with the sound discretion of the trial court, and that a ruling will not be upset absent a showing of abuse of that discretion. Wilson v. Lambert, 613 P.2d 765, 767 (Utah 1980).

As to the standard for determining an abuse of discretion, the general rule is that the appellate Court presumes that the discretion was properly exercised unless the record clearly shows the contrary. Donohue v. Intermountain Health Care, Inc., 748 P.2d 1067 (1987).

When plaintiff's counsel indicated the possibility of appealing this matter, it was brought to his attention that a basis for the ruling was laches, and an abuse of discretion would have to be shown. Nevertheless this costly appeal was instituted.

This Court was absolutely correct in ruling that the issue herein is straightforward; the appeal is wholly without merit, if not frivolous; the trial court's exercise of its discretion was clearly not abusive; summary affirmance is entirely justified; and double costs are appropriately assessed against the plaintiff

and appellant.

DATED this 30th day of June, 1989.

LYNN P. HEWARD
Attorney for Defendant and Respondent
Sandra G. Williams

CERTIFICATE OF SERVICE

I hereby certify that four true and exact copies of the foregoing Answer to Petition for Rehearing were mailed or delivered to Robert L. Lord, 320 South 300 East, #4A, Salt Lake City, Utah 84111, on this 30th day of June, 1989.